

1998

State of Utah v. Deborah Jo Ann Sisk : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Norman Plate; Assistant Attorney General; Attorneys for Appellee.

Daneil T.A. Cottis; Attorney for Appellant.

Recommended Citation

Brief of Appellant, *Utah v. Sisk*, No. 980149 (Utah Court of Appeals, 1998).
https://digitalcommons.law.byu.edu/byu_ca2/1445

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
K F U
50

.A10

DOCKET NO. 980149-CA

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

STATE OF UTAH,)	
)	
Plaintiff-Appellee,	)	Case No. 980149 - CA
vs.)	
)	
DEBORAH JO ANN SISK,)	
	)	Priority No. 2
Defendant-Appellant)	

BRIEF OF APPELLANT
DEBORAH JO ANN SISK

On Appeal from the Judgment of
the Fifth Judicial District Court
in and for Iron County, State of Utah
Honorable Robert T. Braithwaite, District Court Judge

Daniel T.A. Cotts, Esq.
Daniel T.A. Cotts, P.C.
Jamestown Square
141 North Main, Suite 210
Cedar City, UT 84720

FILED
Utah Court of Appeals

SEP 15 1998

Julia D'Alesandro
Clerk of the Court

Norman Plate, Esq.
Assistant Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854-0854
Salt Lake City, UT 84114-0854

Attorneys for Appellee

Attorney for Appellant

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

STATE OF UTAH,)	
)	
Plaintiff-Appellee,	)	Case No. 980149 - CA
vs.)	
)	
DEBORAH JO ANN SISK,)	
	)	Priority No. 2
Defendant-Appellant)	

BRIEF OF APPELLANT
DEBORAH JO ANN SISK

On Appeal from the Judgment of
the Fifth Judicial District Court
in and for Iron County, State of Utah
Honorable Robert T. Braithwaite, District Court Judge

Daniel T.A. Cotts, Esq.
Daniel T.A. Cotts, P.C.
Jamestown Square
141 North Main, Suite 210
Cedar City, UT 84720

Norman Plate, Esq.
Assistant Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854-0854
Salt Lake City, UT 84114-0854

Attorneys for Appellee

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF CASES AND AUTHORITIES	iii
STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW.	2
DETERMINATIVE CONSTITUTIONAL PROVISIONS	3
STATEMENT OF THE CASE	3
I. Nature of the Case	3
II. Proceedings and disposition below	4
III. Statement of the facts	5
SUMMARY OF THE ARGUMENT	8
ARGUMENT	10
I. BARNES' FAILURE TO OBJECT TO THE ENTRY OF THE VIDEOTAPE INTO EVIDENCE FELL BELOW THE OBJECTIVE STANDARD OF REASONABLE REPRESENTATION, DEPRIVING SISK OF EFFECTIVE ASSISTANCE OF COUNSEL AND THE RESULT WAS PREJUDICIAL TO SISK.	10
II. THE TERM OF SISK'S PROBATION PROHIBITING HER FROM OWNING OR POSSESSING ANY ANIMALS, AND REQUIRING HER TO RID HERSELF OF HER PERSONAL PETS AMOUNTS TO CRUEL AND UNUSUAL PUNISHMENT.	13
A. The term of Sisk's probation requiring her to sell or trade her personal dogs, and thereafter not own or possess any animals constitutes cruel and unusual punishment under the Eight Amendment to the U.S. Constitution.	14

B.	The term of Sisk’s probation requiring her to sell or trade her personal dogs, and thereafter not own or possess any animals constitutes cruel and unusual punishment under Article I, Section 9 of the Utah Constitution.	16
----	--	----

CONCLUSION		18
------------	--	----

ADDENDUM		21
----------	--	----

TABLE OF CASES AND AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Gregg v. Georgia</u> , 428 U.S. 153 (1976)	15
<u>Monson v. Carver</u> , 928 P.2d 1017 (Utah 1996)	16
<u>Robinson v. State of California</u> , 370 U.S. 660 (1962)	14
<u>State v. Andrews</u> , 843 P.2d 1027 (Utah 1992)	16
<u>State v. Bastian</u> , 756 P.2d 902 (Utah 1988)	16
<u>State v. Brechlin</u> , 846 P.2d 1274 (Utah 1993)	10
<u>State v. Carter</u> , 776 P.2d 886 (Utah 1989)	11, 12
<u>State v. Dunn</u> , 850 P.2d 1201 (Utah 1993)	2, 10, 11, 12
<u>State v. Frame</u> , 723 P.2d 401 (Utah 1986)	11, 12
<u>State v. Gardner</u> , 947 P.2d 630 (Utah 1997)	15, 16, 17
<u>State v. Hanson</u> , 627 P.2d 53 (Utah 1981)	16
<u>State v. Julian</u> , 771 P.2d 1061 (Utah 1989)	11, 12
<u>State v. Lovell</u> , 785 P.2d 909 (Utah 1988)	11, 12
<u>State v. McNicol</u> , 554 P.2d 303 (Utah 1976)	10
<u>State v. Moritzsky</u> , 771 P.2d 668 (Utah Ct. App. 1989)	11
<u>State v. Nance</u> , 438 P.2d (Utah 1968)	2, 14, 15, 16
<u>State v. Russell</u> , 791 P.2d 188 (Utah 1990)	16
<u>State v. Teague</u> , 336 P.2d 338 (Or. 1959)	15
<u>State v. Templin</u> , 805 P.2d 182 (Utah 1990)	2, 11, 12

<u>State v. Verde</u> , 770 P.2d 116 (Utah 1989)	11, 12
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984)	2, 10, 11, 12, 13
<u>Trop v. Dulles</u> , 356 U.S. 86 (1958)	15
<u>Weems v. U.S.</u> , 217 U.S. 349 (1910)	15

STATUTES

Utah Code Ann. § 76-9-301(1) (1953 as amended)	4
Utah Code Ann. § 76-9-301(3) (1953 as amended)	4

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. VI	3, 10
U.S. CONST. amend VIII	3, 14
UTAH CONST. art. I, § 9	3, 14

)	
STATE OF UTAH,)	
)	
Plaintiff-Appellee,)	Case No. 980149 - CA
vs.)	
)	
DEBORAH JO ANN SISK,)	
)	Priority No. 2
Defendant-Appellant)	
)	

Appellant Deborah Jo Ann Sisk (“Sisk”) appeals from a decision of the Fifth Judicial District Court in and for Iron County. Sisk appeals both the guilty verdict, and the provision of her sentence by the Honorable Robert T. Braithwaite, District Court Judge which forced her to sell or trade her personal pets and prohibits her from owning or possessing any animals during the term of her probation. This Court has jurisdiction over Sisk’s appeal pursuant to UTAH CODE ANN. § 78-2a-3(2)(e) (1953, as amended).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW
AND THE STANDARDS OF REVIEW

Issues

1. Were the actions and omissions of Sisk's trial counsel so lacking and ineffective as to deprive Defendant of her constitutional right to assistance of counsel?
2. Does the provision of Sisk's sentence which required her to sell or trade her personal pets and prohibits her from owning, possessing or caring for any animals, amount to cruel and unusual punishment?

Standards of Review

1. In determining whether a defendant was denied the effective assistance of counsel, the defendant must show that counsel's representation "fell below an objective standard of reasonableness," and that counsel's errors prejudiced the defendant, i.e., that but for the error, there is a reasonable probability that a more favorable result for the defendant would have been obtained. Strickland v. Washington, 466 U.S. 668, 690-91, 694 (1984); State v. Dunn, 850 P.2d 1201 (Utah 1993); State v. Templin, 805 P.2d 182, 186 (Utah 1990).
2. The standard for determining whether a sentence amounts to cruel and unusual punishment in the circumstances of a given case, is "whether the sentence imposed in proportion to the offense committed is such as to shock the moral sense of all reasonable men as to what is right and proper under the circumstances." State v. Nance, 438 P.2d 542, 544 (Utah 1968).

DETERMINATIVE CONSTITUTIONAL PROVISIONS

The following Constitutional provisions are determinative in this appeal:

U.S. CONST. amend VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

UTAH CONST. art. I, § 9:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor.

STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal from a conviction dated December 19, 1997 in the Fifth Judicial District Court in and for Iron County, the Honorable Robert T. Braithwaite presiding. At the trial on that date Sisk was convicted by a jury of 5 counts of Aggravated Cruelty to an Animal, and 31 counts of Cruelty to an Animal. The charges stem from a “raid” on her pet shop after complaints were made about the conditions inside the store. Sisk now seeks to overturn her conviction on

the grounds of ineffective assistance of her trial counsel. Sisk also seeks to overturn the term of her sentence imposed by Judge Braithwaite, asserting that the requirement that she give up her personal pets and not own or possess any animals during her probation amounts to cruel and unusual punishment.

II. Course of the Proceedings and Disposition Below

Deborah Jo Ann Sisk was charged on July 28, 1997 with 5 counts of Aggravated Cruelty to an Animal, each a Class A Misdemeanor pursuant to UTAH CODE ANN. § 76-9-301(1) (1953, as amended) and 31 counts of Cruelty to an Animal, each a Class B Misdemeanor pursuant to UTAH CODE ANN. § 76-9-301(3) (1953, as amended). At the trial, the State introduced into evidence a video tape which purported to be an “interview” with Dr. H.S. Thinnes, a local veterinarian, regarding the conditions inside Sisk’s pet store, “Pinky’s Pets.” What the video tape actually contained was a graphic exposé of the animals inside the store, including a scene in which a small kitten was dying. Sisk’s trial counsel, Keith C. Barnes (“Barnes”) failed to object to the video tape’s entry into evidence on the basis of its inflammatory nature (and corresponding likelihood to unfairly prejudice the jury), and the video tape was shown to the jury in its entirety. At the sentencing hearing on February 13, 1998, Sisk’s sentence of incarceration and fine were stayed, pending her strict adherence to, and compliance with, probation. As a term of her probation, Sisk was ordered to sell or trade any animals currently in her possession (Defendant's six dogs) within 45 days of the date of sentencing, and was ordered

that, thereafter, she was not to possess or own any animals as a term of her probation. On March 10, 1998 Sisk appealed her conviction and hereby asks this Court to overturn her conviction. Sisk also asks this Court to overturn the condition of her sentence / probation requiring her to give up her personal pets and prohibiting her from owning or possessing any animals during the term of her probation.

III. Statement of the Facts

On February 15, 1997, Sisk entered into a lease for the premises located at 60 North Main in Cedar City, Utah for the purpose of opening a pet store, Pinky's Pets (the "store").

On July 15, 1997, Sisk received word that her brother had died at age 37. This news, coupled with the February death of her brother-in-law, with whom she was very close, caused Sisk to have a nervous breakdown. On July 16, 1997, Sisk was admitted to the Dixie Regional Medical Center in St. George, Utah for treatment of her fragile mental state and for depression.

On July 16, 1997 three teenagers reported to Animal Control Officer Kerry Gunther ("Officer Gunther") that they had been trying to access Pinky's Pets and had not been able to find anyone at the store since Monday, July 14th. The teens reported that pets were running amuck through the store.

Officer Gunther attempted that afternoon to make contact with anyone at the store. All of the doors were locked and Officer Gunther claimed that the conditions in the store were

deplorable. He alleged that pets were running throughout the store through feces and urine on the floor, and appeared to be generally without food or water.

On July 17, 1997 Cedar City Animal Control Officer Jason Thomas ("Officer Thomas") was informed by Officer Gunther that the animals at Pinky's Pets were not being taken care of. Officer Thomas responded to the store and found Sisk's daughter, Nikki Sisk, in control. Nikki Sisk granted Officer Thomas access to the store. Officer Thomas found the conditions of the store to be "deplorable." Officer Thomas also found 5 kittens that were dead or dying. Officer Thomas then called Officer Gunther, who responded to the store.

Nikki Sisk insisted that she was not the party responsible for the store in her mother's absence. Rather, she claimed that Sisk's estranged husband, James Sisk, had been left in control of the store during Sisk's hospitalization.

During the course of events which followed the officers' response to the scene, Officer Thomas video-taped an "interview" with Dr. H.S. Thinnes, a local veterinarian, regarding his "professional opinion of the conditions" inside the store.

What the video tape actually contained was a graphic accounting of the animals inside the store, including scenes which showed dead kittens, and a scene in which a small kitten was dying.

Officer Gunther contacted Sisk's estranged husband, James Sisk, who responded to the store and took custody of a large number of animals. The remaining animals were taken into custody by Officer Gunther.

On July 18, 1997, Officer Gunther contacted Sisk by telephone at the mental health wing of the hospital. Sisk informed Officer Gunther that she had left the care of the store to James Sisk.

On July 28, 1997, Sisk was charged with five (5) counts of the offense of Aggravated Cruelty to an Animal, each a Class A Misdemeanor, and thirty-one (31) counts of the offense of Cruelty to an Animal, each a Class B Misdemeanor.

At the trial on December 19, 1997, the state introduced into evidence the video tape of the “interview” with Dr. H.S. Thinnes.

Barnes neglected to object to the entry of the video tape on the basis of its inflammatory nature, and its corresponding likelihood to unfairly prejudice the jury against Sisk. As a result, the video tape was shown to the jury in its entirety, including the scene which showed the dead kittens and the kitten dying.

In his closing statement, the prosecutor, Iron County Attorney Scott M. Burns focused on the video and the condition of the animals in the video, making numerous references to the tape and stating (as he held up the video tape), “tell me that it didn’t break your heart to see little Midnight [a kitten] sitting in the back of that cage.”

The jury returned a guilty verdict on all charges.

At the sentencing hearing on February 10, 1998, Sisk was sentenced to a term of incarceration in the Iron County Jail for a period of one (1) year, and required to pay a fine in the

amount of \$2,500.00 plus and eighty-five percent (85%) surcharge, for her conviction of Count I, Aggravated Cruelty to an Animal, a Class A Misdemeanor. The sentences for Counts II through XXXVI were stayed pending the Defendant's successful completion of all terms and conditions of probation.

Sisk's sentence for Count I was stayed, pending Defendant's strict adherence to and compliance with her probation. Sisk was placed on thirty-six (36) months supervised probation.

As a term of her probation, Sisk was ordered to sell or trade any animals currently in her possession (her six dogs) within 45 days of the date of sentencing, and was further ordered that, thereafter, she was not to possess or own any animals during the pendency of her probation.

SUMMARY OF THE ARGUMENT

Sisk's Sixth Amendment guarantee of effective assistance of counsel has been violated. Her trial counsel, Barnes, neglected to object to the entry of the video taped "interview" into evidence. Barnes should have objected to the entry of the video "interview" into evidence based on its inflammatory nature and its corresponding likelihood to unfairly prejudice the jury against Sisk. Barnes' failure to object to the video fell below the objective standard of reasonable representation. Barnes' failure to object was not based on any "sound trial strategy." He had no "conceivable tactical basis" for failing to object to the video, and his representation therefore fell below the objective standard of reasonableness and constitutes ineffective assistance of counsel.

Barnes' deficient representation was prejudicial to Sisk's case in that the jury was certain to be inflamed and upset by the contents of the video. Because of the inflammatory nature of the video, had the objection been made, and had the jury not viewed the video, there is a "reasonable probability" that the outcome of the trial would have been more favorable to Sisk.

Because Barnes' representation was deficient, and because the deficiency was prejudicial to Sisk, the guilty verdict should be overturned and the case should be remanded back to the trial court so that Sisk might be afforded a fair and unprejudiced trial.

Further, Sisk's guaranteed protection against cruel and unusual punishment under both the Eighth Amendment of the United States Constitution, and Article I, Section 9 of the Utah Constitution has also been violated. The provision of the Sisk's probation which forces her to get rid of her own personal pets and prohibits her from owning or possessing any animals amounts to cruel and unusual punishment. The inclusion of this term "exceeds what can be justified by an appeal to the legitimate penal goals of the State," and cannot be said to "advance any of the objectives of the criminal law." It was included to cause suffering in a wanton or vindictive manner and therefore amounts to cruel and unusual punishment, and should be overturned.

ARGUMENT

- I. BARNES' FAILURE TO OBJECT TO THE ENTRY OF THE VIDEOTAPE INTO EVIDENCE FELL BELOW THE OBJECTIVE STANDARD OF REASONABLE REPRESENTATION, DEPRIVING SISK OF EFFECTIVE ASSISTANCE OF COUNSEL AND THE RESULT WAS PREJUDICIAL TO SISK.

Sisk was denied her Constitutional right to effective assistance of counsel due to the failure of her trial counsel, Keith C. Barnes to object to the entry of the video taped "interview" into evidence, based on its inflammatory nature and its corresponding likelihood to unfairly prejudice the jury. Barnes' failure to object to the entry of the video tape resulted in prejudice to Sisk, as the jury was exposed to a graphic exposé of the conditions inside the store.

The Sixth Amendment of the United States Constitution guarantees defendants adequate assistance of counsel. U.S. CONST. amend. VI. This right has been held to be the right to *effective* assistance of counsel. State v. McNicol, 554 P.2d 303, 204 (Utah 1976)(emphasis added). It has been almost universally held that, in order to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's representation fell below and objective standard of reasonableness, and that a reasonable probability exists that, but for counsel's errors, a more favorable result for the accused would have been obtained. State v. Brechlin, 846 P.2d 1274 (Utah 1993)(citing Strickland v. Washington, 466 U.S. 668, 688 (1984)).

The Utah Supreme Court expanded on this standard in State v. Dunn, 850 P.2d 1201 (Utah 1993):

To show ineffective assistance of counsel, a defendant must (i) identify specific acts or omissions by counsel that fall below the standard of reasonable professional assistance when considered at the time of the act or omission and under all the attendant circumstance, and (ii) demonstrate that counsel's error prejudiced the defendant, i.e., that but for the error, there is a reasonable probability that the verdict would have been more favorable to the defendant.

Id., (citing Strickland, at 688); *see also* State v. Templin, 805 P.2d 182, 186 (Utah 1990); State v. Carter, 776 P.2d 886 (Utah 1989); State v. Verde 770 P.2d 116, 119 (Utah 1989); State v. Lovell, 758 P.2d 909, 913 (Utah 1988); State v. Frame, 723 P.2d 401, 405 (Utah 1986) (per curiam).

In determining whether counsel's performance is constitutionally deficient, it is presumed that counsel has rendered adequate assistance. Strickland, at 690. In Dunn, the Utah Supreme Court stated that, "if the challenged act or omission might be considered sound trial strategy, we will not find that it demonstrates inadequacy of counsel." State v. Dunn, at 1225. *see* State v. Carter, 776 P.2d 886, 894 (Utah 1989); and State v. Julian, 771 P.2d 1061, 1063-64 (Utah 1989) (both holding that defendant failed to demonstrate ineffective assistance of counsel when he did not sufficiently show how the decisions made by trial counsel were not merely tactical choices). In State v. Moritzsky, 771 P.2d 688 (Utah Ct. App. 1989) this Court expanded: "We must therefore be persuaded that there was a lack of any conceivable tactical basis for counsel's actions before we will reverse a conviction based on ineffective assistance of counsel." Id., at 692.

Further, in order to prevail on a claim of ineffective assistance of counsel, the defendant must show that the deficiency was prejudicial to his or her case. Strickland, at 687-88. *See also*

Carter, at 893; Julian, at 1063. However, it is not enough to simply claim that the alleged errors had some conceivable effect on the outcome. State v. Frame, 723 P.2d 401, 405 (Utah 1986). To be found sufficiently prejudicial, defendant must affirmatively show that a “reasonable probability” exists that, but for counsel’s error, the result would have been different. Id., at 405; *see also* Strickland, at 688; State v. Templin, 805 P.2d 182, 186 (Utah 1990); State v. Verde 770 P.2d 116, 119 (Utah 1989); State v. Lovell, 758 P.2d 909, 913 (Utah 1988).

In the case at hand, Sisk’s trial counsel did not object to the entry of the video taped “interview” with Dr. Thinnes based on its inflammatory nature and its corresponding likelihood to unfairly influence the jury. This amounts to ineffective assistance of counsel because there is simply no conceivable “tactical basis” or “sound trial strategy” in neglecting to object to such evidence. In addition to showing the conditions inside the store, the video specifically showed the scene of the dead kittens and the kitten dying. Sisk asserts that the video was specifically designed to inflame the juries emotions, and that Barnes simply neglected to raise the proper objection. Therefore, Sisk meets this part of the ineffective assistance test as set forth in Strickland, and followed by the Utah Supreme Court in Dunn and numerous other cases.

Furthermore, the error committed by Sisk’s trial counsel in failing to object to the video taped interview was prejudicial to Sisk. The graphic and inflammatory nature of the video would be enough to prejudice any jury against the apparently responsible party, in this case, the owner of the pet store in which the video was taken. In his closing argument, the prosecutor, Iron

County Attorney Scott M. Burns focused on the video and the condition of the animals in the video. He made numerous references to the tape and stated (as he held up the video tape), “tell me that it didn’t break your heart to see little Midnight [a kitten] sitting in the back of that cage.” Had Sisk’s counsel objected to the video based on its obviously inflammatory nature, and its certainty to unfairly prejudice the jury, there is a “reasonable probability” that the outcome of the trial would have been different.

Therefore, because (1) Barnes failed to properly object to the entry of the video taped “interview” into evidence on the basis of its inflammatory nature, and this failure to object was clearly not a “sound trial strategy” and had no “conceivable tactical basis;” and (2) because the result of Barnes’ failure to object certainly prejudiced the jury against Sisk due to the inflammatory nature of the video, Sisk has demonstrated the requisite elements set forth in Strickland to prevail on a claim of ineffective assistance of counsel. This Court should, therefore, reverse the decision and remand the case back to the trial court in order to allow for a fair and unprejudiced trial.

II. THE TERM OF SISK’S PROBATION PROHIBITING HER FROM OWNING OR POSSESSING ANY ANIMALS, AND REQUIRING HER TO RID HERSELF OF HER PERSONAL PETS AMOUNTS TO CRUEL AND UNUSUAL PUNISHMENT.

The tenth term of Sisk’s probation ordered that “Defendant shall sell or trade the animals currently in the possession (six dogs) within forty-five (45) days of the date of this sentence.

Thereafter, the Defendant shall not possess or own any animals as a term and condition of this probation.” (Judgment, Sentence, Stay of Execution of Sentence, Order of Probation, and Commitment, p.4). The inclusion of such a term violates Sisk’s right to be free from cruel and unusual punishment as guaranteed by both the Eighth Amendment to the United States Constitution, and Article I, Section 9 of the Utah Constitution.

The Eighth Amendment to the United States Constitution guarantees that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. CONST. amend VIII. Article I, Section 9 of the Utah Constitution parrots the eighth amendment’s guarantee: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor.” UTAH CONST. art. I, § 9. Although these two provisions are virtually identical, they will be handled separately.

- A. The term of Sisk’s probation requiring her to sell or trade her personal dogs, and thereafter not own or possess any animals constitutes cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution.

The determination of whether a punishment under the Eighth Amendment is cruel or unusual cannot be considered in the abstract. State v. Nance, 438 P.2d 542 (Utah 1968) (citing Robinson v. State of California, 370 U.S. 660, 680 (1962)). The standard for making such a determination has been limited to the question of whether the sentence imposed in proportion to the offense committed is such as to shock the moral sense of all reasonable men as to what is

right and proper under the circumstances. State v. Nance, 438 P.2d 542, 544 (Utah 1968) (citing State v. Teague, 336 P.2d 338, 340 (Or. 1959)).

However, the Utah Supreme Court has stated that “[t]he constitutional prohibition against cruel and unusual punishment was directed not only against punishments which inflict torture, but against all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged. Nance, at 542-3; *see also* Weems v. U.S., 217 U.S. 349 (1910).

In Gregg v. Georgia 428 U.S. 153 (1976), the plurality held that “[a] penalty must also accord with the ‘dignity of man,’ which is the ‘basic concept underlying the Eighth Amendment.’” *Id.*, at 173 (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)); State v. Gardner, 947 P.2d 630 (Utah 1997). The plurality in Gregg specifically “found that the concept of human dignity precludes any punishment that is ‘excessive,’ and a punishment is excessive, the Court found, if it ‘involves the unnecessary and wanton infliction of pain’ or if it is ‘grossly out of proportion to the severity of the crime.’” Gardner, at 646 (quoting Gregg, at 173).

The inclusion of a term requiring Sisk to get rid of all of her personal dogs, some of which she has had for nearly nine years, is simply not proportional to the crime of which Sisk was convicted. Requiring Sisk to give up her own pets because of what happened at the pet store, without any evidence as to their condition or the care that they received is an “unnecessary and

wanton infliction of pain” on the Defendant, and certainly meets the Nance standard of “shocking the moral sense of reasonable men as to what is right and proper under the circumstances.”

Therefore, the probation term requiring Sisk to sell or trade all animals in her possession, and thereafter not to possess or own any animals during the term of her probation amounts to cruel and unusual punishment under the Eighth Amendment to the United States Constitution, and should be overturned,

- B. The term of Sisk’s probation requiring her to sell or trade her personal dogs, and thereafter not own or possess any animals constitutes cruel and unusual punishment under Article I, Section 9 of the Utah Constitution.

As with the Eighth Amendment to the U.S. Constitution, a sentence may be overturned under Article I, Section 9 of the Utah Constitution if it is demonstrated that it amounts to cruel and unusual punishment under the circumstances of the case. The Utah Supreme Court has held “that the standard for cruel and unusual punishment claims in specific applications is “whether the sentence imposed in proportion to the offense committed is such to shock the moral sense of all reasonable men as to what is right and proper under the circumstances.””” State v. Gardner, 947 P.2d 630 (Utah 1996) (quoting Monson v. Carver, 928 P.2d 1017, 1024 (Utah 1996) (quoting State v. Russell, 791 P.2d 188, 190 (Utah 1990) (quoting State v. Bastian, 765 P.2d 902, 904 (Utah 1988)))); *see also* State v. Andrews, 843 P.2d 1027, 1030 (Utah 1992); State v. Hanson, 627 P.2d 53, 56 (Utah 1981); Nance, at 544.

In Gardner, Justice Durham, who wrote the majority opinion, expanded on Article I,

Section 9.

My own reading of the language of article I, section 9 suggests that a punishment, to avoid being unconstitutionally cruel, may not be excessive or grossly disproportionate to the crime it is designed to punish. Although the words “cruel and unusual punishments” do not lend themselves to ready interpretation, I cannot avoid addressing the actual constitutional language. I begin by attempting to understand what is meant by the word “cruel.” While many definitions are possible, Webster’s is representative of what is understood by the word in modern usage:

disposed to inflict pain especially in a wanton, insensate, or vindictive manner : pleased by hurting others : sadistic : . . . bitterly conducted : devoid of mildness : causing or conducive to injury, grief, or pain

WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 546 (1961). Such a definition clearly encompasses torture and other barbarous methods of punishment . . . But when the State causes suffering that is ‘wanton, insensate, or vindictive,’ when it inflicts punishment in a spirit of bitterness or sadism, it can no longer be called necessary. Such is the case when the suffering inflicted by the State exceeds what can be justified by appeal to the legitimate penal goals of the State. This “‘unnecessary and wanton infliction of pain’” constitutes a level of cruelty that is forbidden by our constitutional provision against cruel and unusual punishments. [citations omitted]. Such a punishment is ‘a gratuitous infliction of pain. It advances none of the objectives of the criminal law. It is the infliction of pain for an irrational reason and is cruel and unusual.’ [citations omitted]. A punishment thus becomes unconstitutionally cruel when the suffering inflicted by the State exceeds what is necessary to serve the legitimate ‘objectives of the criminal law.’

State v. Gardner, at 633-34.

In the case at bar, the inclusion of the sentencing term in question, which forces Sisk to give up her own pets and prohibits her from owning or possessing any animals (the “Pet Term”) causes suffering that is wanton, insensate, or vindictive. It “exceeds what can be justified by an

appeal to the legitimate penal goals of the State,” and certainly does not “advance any of the objectives of the criminal law,” and thus inflicts pain for an irrational reason. Sisk contends that the term was included in her probation out of a sense of vindictiveness, and therefore amounts to cruel and unusual punishment.

Because the inclusion of the “Pet Term” in Sisk’s sentence exceeds what can be justified by an appeal to the legitimate penal goals of the State, and does not advance any of the objectives of the criminal law, it causes suffering that is wanton or vindictive. The “Pet Term” amounts to cruel and unusual punishment under Article I, Section 9 of the Utah Constitution, and therefore must be overturned.

CONCLUSION


Sisk was denied her Constitutional right to effective assistance of counsel due to her trial counsel’s errors and omissions at trial in neglecting to object to the entry of the video taped “interview” with Dr. Thinnes. Barnes should have objected to the entry of the video “interview” because of its inflammatory nature, and because there was a high likelihood that the jury would be unfairly prejudiced against Sisk when they viewed the tape. Barnes’ failure to object to the video tape was not based on any “sound trial strategy.” There was no conceivable “tactical basis” for failing to object to the tape, and thus Barnes’ representation fell below the “objective standard of reasonableness” and thereby constitutes ineffective assistance of counsel. Further, Barnes’ deficient representation was certainly prejudicial to Sisk in that the jury was certain to be

inflamed by the contents of the video. Had the jury not viewed the video, there is a reasonable probability that the outcome of the trial would have been more favorable to Sisk. Therefore, the case should be reversed and remanded back to the trial court in order to afford Sisk a fair and unprejudiced trial.

Even if this Court finds that Sisk's trial counsel was not ineffective, and therefore upholds the jury verdict, the portion of Sisk's sentence which forced her to give up her personal pets, and further prohibits her from owing or possessing any animals should be overturned. The inclusion of this "Pet Term" is an unnecessary and wanton infliction of pain and, as such, is "shocking the moral sense of reasonable men as to what is right and proper under the circumstances." This "Pet Term" therefore violates Sisk's right to be free from cruel and unusual punishment under the Eighth Amendment to the United States Constitution. Further, the "Pet Term" "exceeds what can be justified by an appeal to the legitimate penal goals of the State," and does not "advance any of the objectives of the criminal law." It was included to cause suffering in a wanton or vindictive manner and therefore amounts to cruel and unusual punishment under Article I, Section 9 of the Utah Constitution, and accordingly, should be overturned.

RESPECTFULLY SUBMITTED, this 14th day of September, 1998.

DANIEL T.A. COTTS, P.C.



DANIEL T.A. COTTS, Esq.
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that on this 15th day of September, 1998, I mailed two true and correct copies of the foregoing BRIEF OF APPELLANT DEBORAH JO ANN SISK, postage pre-paid to:

Norman Plate, Esq.
Assistant Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854-0854
Salt Lake City, UT 84114-0854



Daniel T.A. Cotts

ADDENDUM

TABLE OF CONTENTS OF ADDENDUM

1.	Judgment, Sentence, Stay of Execution of Sentence, Order of Probation, and Commitment	001
2.	Notice of Appeal	006

SCOTT M. BURNS (#4283)
Iron County Attorney
97 North Main, Suite #1
P.O. Box 428
Cedar City, Utah 84720
Telephone: (801) 586-6694

FILED
FEB 13 1998
5th DISTRICT COURT
IRON COUNTY
DEPUTY CLERK *[Signature]*

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY,
STATE OF UTAH

STATE OF UTAH,	)	JUDGMENT, SENTENCE, STAY
	)	OF EXECUTION OF SENTENCE,
Plaintiff,	)	ORDER OF PROBATION, AND
	)	COMMITMENT
vs.)	
DEBORAH JO ANN SISK,	)	Criminal No. 971500759
)	
Defendant.	)	Judge Robert T. Braithwaite

The Defendant, DEBORAH JO ANN SISK, having been convicted pursuant to a jury trial and jury verdict of five (5) counts of AGGRAVATED CRUELTY TO AN ANIMAL, each a Class A Misdemeanor, and thirty-one (31) counts of CRUELTY TO AN ANIMAL, each a Class B Misdemeanor, on December 19, 1997, and the Court having entered said verdicts and thereafter having ordered the preparation of a presentence investigation report, and after said report was prepared and presented to the Court, the above-entitled matter having been called on for sentencing on February 10, 1998, in Cedar City, Utah, and the above-named Defendant, DEBORAH JO ANN SISK, having appeared before the Court in person together with her attorney of record, Keith C. Barnes, and the State of Utah having appeared by and through Iron County Attorney Scott M. Burns, and the Court having reviewed the presentence investigation report and having further reviewed the

file in detail and thereafter having heard statements from the Defendant, her attorney, and the Iron County Attorney, and the Court being fully advised in the premises now makes and enters the following Judgment, Sentence, Stay of Execution of Sentence, Order of Probation, and Commitment, to wit:

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant, DEBORAH JO ANN SISK, has been convicted, pursuant to a jury trial and jury verdict, of five (5) counts of AGGRAVATED CRUELTY TO AN ANIMAL, each a Class A Misdemeanor, and thirty-one (31) counts of CRUELTY TO AN ANIMAL, each a Class B Misdemeanor, and the Court having asked whether the Defendant had anything to say in regard to why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, it is adjudged that the Defendant is guilty as charged and convicted.

SENTENCE

IT IS HEREBY ORDERED that the Defendant, DEBORAH JO ANN SISK, and pursuant to her conviction of Count I, AGGRAVATED CRUELTY TO AN ANIMAL, a Class A Misdemeanor, is hereby sentenced to a term of incarceration in the Iron County Jail for a period of one (1) year, and the Defendant is hereby placed in the custody of the Iron County Sheriff.

IT IS FURTHER ORDERED that the Defendant, DEBORAH JO ANN SISK, pay a fine in the sum and amount of two thousand five hundred dollars (\$2,500), plus an eighty-five percent (85%) surcharge, for her conviction of Count I, AGGRAVATED CRUELTY TO AN ANIMAL, a Class A Misdemeanor.

IT IS FURTHER ORDERED that sentences for Counts II through XXXVI shall be stayed pending the Defendant's successful completion of all terms and conditions of probation.

STAY OF EXECUTION OF SENTENCE

IT IS HEREBY ORDERED that the execution of the term of incarceration imposed and the fine imposed in this case are hereby stayed, pending the Defendant's strict adherence to and compliance with the following terms and conditions of probation.

ORDER OF PROBATION

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant, DEBORAH JO ANN SISK, is hereby placed on probation for a period of thirty-six (36) months under the supervision of the Utah Department of Adult Probation and Parole, strictly within the following terms, provisions, and conditions:

1. The Defendant shall forthwith make and execute a formal agreement provided by the Utah Department of Adult Probation and Parole, and during the period of probation set forth herein, shall strictly conform with all the terms, provisions, and conditions, and the same are hereby made a part of this Order by means of incorporation.
2. That the Defendant shall report as ordered and required by the Court and the Department of Adult Probation and Parole during the period of this probation.
3. That the Defendant shall commit no law violations during the period of this probation.
4. That the Defendant shall serve a term of incarceration in the Iron County Jail for a period of fifteen (15) days.

5. That the Court shall conduct a restitution hearing upon the Defendant's completion of the term of incarceration to determine the amount of restitution (if any) owed to Cedar City Corporation.

6. That the Defendant shall pay a fine and surcharge in the amount of one thousand five hundred dollars (\$1,500) or, in the alternative, complete three hundred (300) hours of community service as approved by the Court and Adult Probation and Parole.

7. That the Defendant shall continue ongoing mental health treatment with Southwest Center until released by the treatment provider.

8. That the Defendant shall reimburse Iron County in the sum and amount of two hundred dollars (\$200) for public defender fees at a rate determined by Adult Probation and Parole.

9. That the Defendant shall not seek, obtain, or perform any type of employment that includes the sale, possession, care, or transportation of any animal.

10. That the Defendant shall sell or trade the animals currently in the possession (six dogs) within forty-five (45) days of the date of this sentence. Thereafter, the Defendant shall not possess or own any animals as a term and condition of this probation.

COMMITMENT

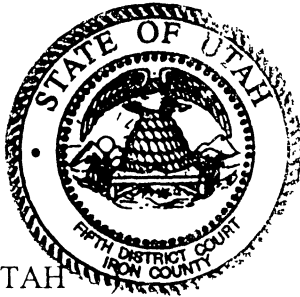
TO THE SHERIFF OF IRON COUNTY, STATE OF UTAH:

YOU ARE HEREBY COMMANDED to take the Defendant, DEBORAH JO ANN SISK, and deliver her to the Iron County/Utah State Correctional Facility in Cedar City, Utah, there to be kept and confined in accordance with the above and foregoing Judgment, Sentence, Stay of

Execution of Sentence, Order of Probation, and Commitment.

DATED this 13 day of February, 1998.

BY THE COURT:



Robert T. Braithwaite
ROBERT T. BRAITHWAITE
District Court Judge

CERTIFICATE

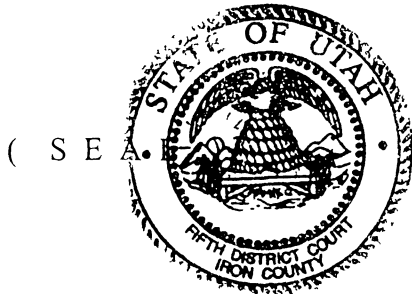
STATE OF UTAH
:ss.
COUNTY OF IRON)

I, CAROLYN BULLOCH, Clerk of the Fifth Judicial District Court in and for Iron County, State of Utah, hereby certify that the foregoing is a full, true and exact copy of the original Judgment, Sentence, Stay of Execution of Sentence, Order of Probation, and Commitment in the case entitled State of Utah vs. Deborah Jo Ann Sisk, Criminal No. 971500759, now on file and of record in my office.

WITNESS my hand and the seal of said office in Cedar City, County of Iron, State of Utah, this 13 day of February, 1998.

CAROLYN BULLOCH

CAROLYN BULLOCH
District Court Clerk



By: Michelle Sisk
Deputy District Court Clerk

KEITH C. BARNES (7136)
THE PARK FIRM, P.C.
 965 South Main, Ste. 6
 P.O. Box 765
 Cedar City, UT 84720
 Telephone: (801) 586-6532
 Fax: (801) 586-3879

IRON COUNTY, STATE OF UTAH

Case No. 971500759

DATED THIS 10th day of March, 1998.

006

MAILING CERTIFICATE

I certified that on the 11 day of March, 1998, I caused to be mailed a true and correct copy of the foregoing NOTICE OF APPEAL to:

Mr. Scott M. Burns
Iron County Attorney
P.O. Box 428
Cedar City, UT 84720

Karen Chambliss
Secretary